IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 200 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JANAKBHAI KANUBHAI THAKKAR & 5 - Applicant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :

M/S THAKKAR ASSOC. for the Applicants.
Ms. Nandini Joshi, Addl. PUBLIC PROSECUTOR for Respondent no.1.

Mr. Harshadray A Dave for respondent no.2.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 23/08/2006

ORAL JUDGMENT

The present Revision Application has been preferred against the order dated 7th March, 2006

below application Exh. 66 in Sessions Case No. 76 of 2004 passed by the Additional Sessions Judge, Fast Track Court no.1, Ahmedabad (Rural), Ahmedabad, whereby the application given by the present applicants under section 311 of the Code of Criminal Procedure for examination of certain witnesses referred to in the application exh. 66, as court witnesses, has been dismissed.

FACTS OF THE CASE:

Prosecution dropped certain witnesses. Accused gave application below Exh.66, that these witnesses may be examined as Court witnesses, so that accused can cross-examine these witnesses under Section 154 of The Indian Evidence Act, 1872.

2. I have heard the learned Senior Advocate Mr. P.M.Thakkar for the applicants, who has mainly submitted that if the application Exh. 66 is dismissed, it takes away the crucial right of cross-examination of those witnesses by the applicants. These witnesses ought to be examined as court witnesses so that the present applicants being

accused in sessions case can easily cross-examine and bring on record certain material of investigation on record. The witnesses who are named in Exh. 66 are, in fact, police officers who initiated investigation as an accidental death, whereas the charge-sheet has been filed against the applicants for the offences punishable under sections 302, 323, 504 and 506(2) read with section 114 of Indian Penal Code. This aspect of the matter has not been appreciated by the trial court while passing the impugned order dated 7th March, 2006 below Exh. 66 in Sessions Case no. 76 of 2004 and hence the impugned order deserves to be quashed and set aside.

3. I have heard the learned Additional Public Prosecutor for the respondent State, who has submitted that the examination of witnesses and dropping of witnesses thereof, all depends upon the wisdom of the Public Prosecutor who is conducting the case. He is the best navigator of the case. The learned APP has also relied upon the decision rendered by the Hon'ble Supreme Court in the case of Hukam Singh vs. State of Rajasthan reported in (2000)

7 SCC, 490, and more particularly para-14 thereon and pointed out that if any witness has not been examined by the Public Prosecutor, it is for the defence to cite them as their defence witnesses and therefore, the witnesses who are dropped by the prosecution by the order of the competent trial court, can be examined as defence witnesses by the accused. Secondly, it is also submitted by the learned Additional Public Prosecutor that the application Exh. 66 is a premature application as the statements under section 313 of the Code of Criminal Procedure have not yet been recorded. The defence witnesses can be examined only after the statements under section 313 of the Code of Criminal Procedure have been recorded. Thirdly, it is also submitted by the learned Additional Public Prosecutor that the apprehension expressed by the applicants is uncalled for and unwarranted and they are not going to lose any right of cross-examination of the witnesses who are referred to in the application Exh. 66. If those witnesses are examined as defence witnesses, and if they are giving depositions in favour of the present applicants, (original accused) then there is no need

of any cross-examination by the present applicants and if the witnesses named in the application Exh. 66 are hostile to the present applicants, they are not losing the right of cross-examination of those witnesses under section 154 of the Indian Evidence Act, 1872. Thus, the apprehension shown by the present applicants before this Court as well as before the trial court as referred in para-2 of the impugned order is uncalled for and unwarranted. In view this, the impugned order dated 7th March, 2006 below application exh. 66 in Sessions case no. 76 of 2004 passed by the trial court is absolutely true and correct and in consonance with facts of the present case.

4. I have also heard the learned advocate Mr. Dave for the newly joined party, i.e. respondent no. 2-original complainant. He has been joined as party-respondent vide order dated 23rd August, 2006 in Criminal Miscellaneous Application no. 4450 of 2006. It is submitted by the learned advocate for respondent no. 2 that the order below application exh. 66 in Sessions case no.76 of 2004 passed by the

trial court is true, correct, legal and in consonance with the facts of the present case. It is not obligatory on the part of the Public Prosecutor to examine all the witnesses who are referred in the charge-sheet. All depends upon the wisdom of the Public Prosecutor. It all depends upon the facts of each and every case. The prosecution cannot lead two stories at a time, namely one of murder and second of accidental death. Always, initially, the police is starting the investigation as an accidental case and upon recording certain statements, when the investigating agency comes to know that this is a case of offence, they are registering the offence at a later stage. Merely because, the offence is registered at a later stage, after some preliminary investigation, it is not fatal to the prosecution and therefore, rightly certain witnesses have been dropped by the Public Prosecutor who recorded the case as accidental death. The investigating agency is not having a magic bond who can know in advance whether it is the case of accidental death or a murder. On the contrary, the recording of accidental death is the reflection of truth on the part of the

investigating agency. What is recorded initially (accidental death) was not found true and correct. Subsequently, upon recording statements of witnesses, some of the witnesses are eye witnesses who have seen the murder and therefore, those officers have not been examined who recorded and investigated accidental death. Initially, the application for dropping of witnesses was disallowed by the trial court. Thereafter, a Revision Application was moved by the original complainant, that is, the present respondent no. 2 and this Criminal Revision Application no. 89 of 2006 was allowed by this Court vide order dated 10th February, 2006. Thus, the witnesses have been correctly and rightly dropped by the prosecution. In view of these facts, the order passed by the trial court may not be interfered with by this Court. He has also relied upon the decision rendered by the High Court of Sikkim in the case of **Nar Bahadur Bhandari vs. State reported in 2004 Criminal Law Journal, 575** and more particularly para-5 thereof and pointed out that the accused is not entitled to insist that the prosecution witnesses should be examined as court witnesses when their

evidence is not found necessary by the prosecution for the just decision of the case and such witnesses may be examined as defence witnesses. Thus, it is submitted by the learned counsel for the original complainant that the witnesses who are referred in the application exh. 66 can be examined by the present applicants as their defence witnesses and the original complainant has no objection is those witnesses are allowed to be examined as defence witnesses.

5 Having heard the learned advocates for both the sides and looking to the facts and circumstances of the case, I see no reason to take any deviation from the order dated 7th March, 2006 below application exh. 66 in Sessions case no. 76 of 2006 passed by the learned Additional Sessions Judge, Fast Track Court no.1, Ahmedabad (Rural), Ahmedabad for the following facts and reasons:

(i) The offence under sections 302, 323, 504, 506(2) read with section 114 of the Indian Penal Code has been registered with

Sanand town police station being Cr. No. No. I/192 of 2003 on 22nd October, 2003 which is at Annexure “G” to the memo of the present compilation. Thereafter, upon investigation, charge-sheet was filed. Certain witnesses have already been examined by the prosecution who are eye witnesses in the aforesaid offence, whereas some of the witnesses were dropped by the pursis given by the Public Prosecutor. They were witness nos. 18, 20, 21, 22, 28 and 29. All these witnesses are connected with registration of entry of accidental death. Initially, some investigation was also carried out in that direction. So sooner did police come to know that the case which is registered as accidental death, is not, in fact, an accidental death, but, is an offence under section 302 of the Indian Penal Code and other sections of Indian Penal Code, the offence was registered as such and thereafter, charge-sheet was filed and therefore, those witnesses who are connected

with entry of accidental death, have been correctly dropped. Initially, the trial court rejected the application for dropping of the witnesses as referred to hereinabove. Criminal Revision Application was preferred by the original complainant bearing Criminal Revision Application no. 89 of 2006 and this Court, vide order dated 10th February, 2006, allowed dropping of those witnesses. The said order is at Annexure “B” to the memo of the Revision Application. In pursuance of this order, (especially, as per para-5 thereof), an application exh. 66 was given in Sessions case no. 76 of 2004 by the present applicants that the prosecution witness nos. 18, 20, 21, 22, 28 and 29 may be examined as court witnesses under section 311 of the Code of Criminal Procedure. This application has been dismissed by the trial court, keeping in mind the fact that the statements of the accused under section 313 of the Code of Criminal Procedure were not yet recorded. The witnesses who are dropped

by the prosecution can be examined as defence witnesses. Looking to the facts of the present case, the reasons assigned by the trial court are absolutely true, correct and in consonance with the decisions rendered by the competent courts. It has been observed by the Hon'ble Supreme Court in the case of **Hukam Singh vs. State of Rajasthan, reported in (2000), 7 SCC, 490**, especially in para-14 thereof as under:

> *"14. The situation in a case where the prosecution cited two categories of witnesses to the occurrence, one consisting of persons closely related to the victim and the other consisting of witnesses who have no such relation, the Public Prosecutor's duty to the Court may require him to produce witnesses from the latter category, also subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in court about that fact and skip that witness from being examined as a prosecution witness. It is open to the defence to cite him and examine him as a defence witness. The decision in this regard has to be taken by the Public Prosecutor in a fair manner. He can interview the witness beforehand to enable him to know well in advance the*

stand which that particular person would be adopting when examined as a witness in court." (Emphasis supplied)

In view of the aforesaid judgment, the learned Public Prosecutor dropped the prosecution witnesses. In the facts of the present case, dropping of witnesses has been allowed by this Court vide order dated 10th February, 2006 in Criminal Revision Application no. 89 of 2006 and therefore, it is open for the defence side to examine them as defence witnesses.

(ii) It is always discretionary power vested in the court under section 311 of the Code of Criminal Procedure which enables the court at any stage to summon any witness as a witness and to examine any person or to recall and re-examine any witness already examined, when it appears to be essential to the just decision of the case. There is no legal right vested in the accused to get a particular witness be examined as a Court Witness especially, one who has already been

dropped by the prosecution and when such dropping of witnesses, is allowed by the High Court. The prosecution can drop those witnesses who are found unreliable or whose depositions are not necessary looking to the case of prosecution. Looking to the nature of the offence and looking to the nature of investigation, such dropped witnesses may not be examined by the court as court witnesses so as to avoid more confusion. But it is always open for the defence to cite them as their defence witnesses. It has been held by the High Court of Sikkim in the case of **Nar Bahadur Bhandari vs. State reported in (2004) Criminal Law Journal, 575,** especially in para-8 as under:

"8. The above observation clearly shows that liberty was granted to the accused to examine Mr. T.L.Brahmin as a defence witness. Bare perusal of the statement of the said Mr. Brahmin recorded under section 161, Criminal Procedure Code shows that Mr. T.L. Brahmin had prepared the plan of the building and he gave his tentative view of cost of construction so made to the tune of Rs. 1,13,406.44. If the accused-petitioner desires to establish the factum of the said tentative cost of construction of the

building etc., he can do so by citing and examining the said Mr. Brahmin as his defence witness. But the Court cannot compel the prosecution not to drop the said witness as prosecution witness. However, the Court is to see and examine as to whether it is essential and necessary to examine the said Mr. T.L.Brahmin as Court witness for just decision of the case or not. According to me, it is not essential to examine the said Mr. Brahmin as Court witness.....Petition dismissed."

In view of this judicial pronouncement and looking to the facts of the present case, the order passed by the trial court is absolutely true and correct. The witnesses referred to in the application exh.66 can be examined as defence witnesses at a proper stage by the applicants. Even the respondent no. 2-original complainant has no objection if they are cited as defence witnesses.

(iii) The apprehension expressed by the applicants is uncalled for and unwarranted and they are not going to lose any right of cross-examination of the witnesses who are referred to in the application Exh. 66. If those witnesses are examined as defence

witnesses, and if they are giving depositions in favour of the present applicants, (original accused) then there is no need of any cross-examination by the present applicants and if the witnesses named in the application Exh. 66 are hostile to the present applicants, they are not losing the right of cross-examination of those witnesses under section 154 of the Indian Evidence Act, 1872. Thus, the apprehension shown by the present applicants before this Court as well as before the trial court as referred in para-2 of the impugned order is uncalled for and unwarranted.

6. As a cumulative effect of all the aforesaid facts and reasons as well as judicial pronouncements, there is no substance in the present application. There is no error in the order passed by the trial court, much less, an error, apparent on the face of the record. Hence, the same is hereby dismissed. The order dated 7th March, 2006 below

application exh. 66 in Sessions case no.76 of 2004 passed by the learned Additional Sessions Judge, Fast Track Court no.1, Ahmedabad (Rural), Ahmedabad is hereby upheld. Rule is discharged. Interim relief, if any, stands vacated.

(D.N.Patel,J)

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